IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10226 of 2007
With
SPECIAL CIVIL APPLICATION No. 10176 of 2007
With
SPECIAL CIVIL APPLICATION No. 10227 of 2007
With
SPECIAL CIVIL APPLICATION No. 10229 of 2007
With
SPECIAL CIVIL APPLICATION No. 10231 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE STATE OF GUJARAT & 1 - Petitioner(s)
Versus
VALIBEN SAVJIBHAI - Respondent(s)

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Appearance :
Mr. Hemant Makwana AGP for Petitioner(s) : 1 - 2.
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 17/04/2007

ORAL ORDER

Heard the learned AGP Mr. Hemant Makwana on behalf of the petitioners. In this group of petitions under Article 227 of the Constitution of India, petitioner have challenged the common award passed by the Labour Court Surendranagar in reference no. 130/2000, 131/2000, 132/2000, 133/2000, and 121/2000 dated 28/12/2006 respectively. The Labour Court has set aside termination order of each respondent and granted reinstatement with continuity of service without back wages of interim period. All these references were consolidated with consent of both the parties, therefore, common award has been passed by the Labour Court Surendranagar.

Learned AGP Mr. Makwana submitted that the Labour Court has granted reinstatement without back wages with continuity of service. According to him, some of the respondents have completed more than 10 years and in one case references no. 132/2000 respondent has completed three years service. The service of the respondents were terminated orally on 31/8/1985.

Learned AGP Mr. Makwana submitted that disputes were raised by the respondents after period of 15 years as per contention raised in para 12 of written statement which is at page 42. Therefore, references are fatal and Labour Court should not have decided the

merits of the matter.

He also submitted that at page 47, seniority list of 1976 to 1985 vide exh. 14, was produced by the petitioners wherein the name of the respondents are not there. He also submitted that at page 41, para 6 of the reply, the contention has been raised by the petitioners that respondent department is State Government department, therefore, not covered by definition of industry and the I.D. Act 1947 is not applicable.

He also submitted that respondent workmen has not produced any document before the Labour Court to prove completion of 240 days and it is the burden on the workmen concerned to prove that he has completed 240 days service and mere oral evidence not supported by documentary evidence can not shift such burden on the employer.

He has submitted that the case of the respondents before the Labour Court was that no seniority list was produced or published, the principle of last come first go has not been observed or followed, and certain new employees were recruited by the petitioners. Except this, the learned AGP Mr. Makwana has not made another submission in this group of petitions.

I have perused the common Award passed by the Labour Court, Surendranagar. The statements of claim was filed by the respondent workmen before the Labour

Court and dispute was referred to for adjudication on 28/9/2000. According to the respondents workmen, they were appointed by the petitioners and completed more then 10 years' service; except in one case 3 years service and completed 240 days continuous service. Eventhough, their services were terminated on 31/8/1985 in violation of Secs. 25 (F) (G) (H) of I.D. Act 1947. After termination of the respondents, new employees were recruited, the seniority list was not published and last come first go principle has been violated, therefore, according to the respondents their termination order is bad.

As per para 3 of the of the Award, Labour Court has considered that vide exh. 8 and 10 of the written statement filed by petitioner before the Labour Court, the contention raised by the petitioners before the Labour Court that whatever period where the question of making payment of wages or appears for the days for which workman have not worked does not arise of paying wages or salary and workmen have not remained continue in service and not completed 240 days continuous service.

The petitioner has produced seniority list vide exh. 14 dated 29/5/1986. The first seniority list is prepared dated 29/5/1986, on the date on which the workmen were not working with the petitioners. It is necessary to note that service of the respondents were terminated on 31/8/1985 naturally their name may not be in the seniority list dated 29/5/1986. Whether the seniority list was published at the time of

termination showing the position of respondents while they were in service and prior to the respondents service or not, there is no answer from the petitioners, but it was placed before the Labour Court pointing out the position of the workmen, those who were in service on 29/5/1986, therefore, name of the respondents were not there, reason is that prior to that service of respondents workmen were terminated by the petitioners. Petitioner should have produced seniority list showing position of respondents prior to their termination.

The respondents workmen filed individual affidavit vide exh. 9,10, and 11 in support of the statement of claim and in affidavit, it is pointed out by the respondents workmen that petitioners have not provided muster roll, appointment order, termination order,pay slip and identity card to the respondents merely obtaining the signature in muster roll and wages were paid by the petitioners, these documents are possessed by the petitioners.

After their termination they had approached the petitioners on number of occasion, but merely assurance has been given to the respondent, but respondents were not taken in service by the petitioners so from the date of termination till date raising the dispute on the number of occasion respondents approached the petitioner for service. This fact is narrated in affidavit filed by the respondents workmen. In affidavit also it is made clear that dispute has been raised after some time

because in between number of occasion respondents approached to the petitioners, but they were not taken in job. In affidavit also it is made clear, that each workman has completed continue service of 240 days in preceding 12 months. Vide exh. 16, witness Mr. Y.S.Shah, Deputy Executive Engineer has filed affidavit.

The petitioner has cross examined the workmen by the Advocate. The witness Mr. Y.S.Shah vide exh. 16 submitted that seniority list for the period of 1976 to 1985 produced by the petitioners where respondents name are not reflected and workmen had not produced any evidence in support of their claim, therefore, reference should have to be dismissed.

In cross examination, it was pointed out by the witness of the petitioners that he was working since 2004 at Patdi since 2004, he is not having any information for the period of prior to Dec. 2004 the claim of respondents, the seniority list which was published by the petitioners was not brought to the notice of the respondents workmen by the petitioners. He has no knowledge whether workmen have worked earlier on dudhrej-Vana-Malvan Road or not.

According to him, he has read reply submitted by the petitioner, who has signed written statement, he is not aware about it. Therefore, also admitted in cross examination that in written statement no dispute has been raised by the petitioners to the effect that workmen were not working with the petitioners.

According to him, on record it is not proved that respondents workmen were working with the petitioners. Thereafter, both the learned advocates made submissions before the Labour Court and ultimately Labour Court has framed issued and reason has been given by the Labour Court in respect to issue no. 1.

The Labour Court has considered the affidavit and cross examination of the respondents workmen and come to the conclusion that petitioner has not challenged the evidence of the respondents workmen in respect to the continue service, presence mark in muster roll and payment of wages has been made to the respondents workmen. In written statement, only contention was raised that for that period when respondents are not working and not in service, they were not entitled for any amount of wages. The written statement has been produced by the petitioners before this Court which is at page 40, there is no answer given by the petitioners except the document and legal contention in para 12 raised by the petitioners where no averment has been made to deny the factual aspect which has been made by respondents workmen in their statement of claim. The averment made in the submission or claim, if it is not denied in written statement, it amounts to admission of that fact accepted by the petitioners.

Therefore, Labour Court has rightly appreciated this fact in its award that petitioner has not raised any contention in written statement in respect to the merits whether the respondents workmen had completed

240 days service or not and whether Sec. 25 (F)(G)(H) has been violated or not. Therefore, Labour Court after considering the submissions made by both the learned advocates come to the conclusion that workmen have completed continue service of 240 days because no documentary evidence were given to the respondents by the petitioner about the payment of wages, muster roll, Identity card, wages slip, appointment order and termination order. So in absence of aforesaid documents how the workmen could prove 240 days continue service, that aspect has been considered by the Labour Court, Surendranagar. The Labour Court has come to the conclusion that petitioner having documentary evidence with him which has been admitted by the petitioner that wages has been paid after obtaining the signature of the respondents workmen and presence were also marked in the presence register, so none of the documents were produced by the petitioner before the Labour Court. The petitioner having the possession of documents muster roll, pay register and presence register, but none of the documents has been produced by the petitioner before the Labour Court.

The onus to prove the continue service of 240 days has been discharged by workmen by filing affidavit with cross examination, so onus was shifted upon the employer to dis prove the facts which has been proved by the workmen by proving that workmen had not completed continue service of 240 days continue service by producing relevant original record before the Labour Court. The party who is having original record with him, not disclosed to the Court

with supporting the material, then Court has no other option. The affidavit being an evidence which has been cross examined by the petitioner. So burden was discharged by workmen and thereafter, such evidences were not disproved by petitioner by producing material on record and withheld such important original documents from Labour Court.

The Labour Court had relied upon the decision of Apex Court in Case of R. M. Yellaty reported in 2005 (9) SCALE page 139. This decision is given by the three Judges of the Apex Court. The Labour Court has also considered that looking to the evidence on record, the petitioner has violated Sec. 25 (F)(G)(H) of the I.D. Act 1947. After the termination of the respondents, new employees were recruited as per the evidence of the workmen and at the time of termination of service on 31/8/1985 last come first go also not observed by the petitioners.

The Labour Court has also considered the various decisions relied by both the parties and mainly relied upon the decision of Apex Court in Case of R.M. Yellaty Vs. Assi. Executive Engineer reported in AIR 2006 SC Page 355. In the said decision the Apex Court has considered the case of Range Forest Officer Vs. S.T.Hadimani reported in 2002 (3) SCC page 25.

The Apex Court has also considered the case of Banglore Water Supply & Sewerage Board Vs. A. Rajappa reported in AIR 1978 SC page 548 and State of U.P. Vs. Jai Bir Singh reported in 2005 AIR SCW page 2773 and

other relating decision including the case of Manager, Reserve Bank of India, Banglore, Vs S. Mani reported in (2005) 5 SCC page 100. The Apex Court has observed in para 17, 18, and 19 which are relevant, therefore, all these paras are quoted as under:

> “17. Analyzing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this court has reapetedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workmen stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self serving statements

made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non production of muster rolls per se without any plea of suppression by the claimant workmen will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down basic principle, namely, that the High Court under Art. 226 of the Constitution will not interefer with the concurrent findings of fact recorded by the labour court unless they are preverse. This exercise will depend upon facts of each case.

18. Now applying the above decision to the facts of the present case, we find that the workman herein had stepped in the witness box. He had called upon the management to produce the nominal muster rolls for the period commnencing from 22/11/1988 to 20/6/1994. This period is the period borne out the certificate (Ex. W1) issued by the former Asstt. Executive Engineer the evidence in rebuttal from the side of the management produce five nominal muster rolls (NMRs), out of which 3 NMRs, Ex.M1, Ex.M2 and Ex.M3, did not even relate to the concerned period. The relevant NMRs produced by the management were Ex. M4 and Ex. M5, which indicated that the

workmen had worked for 43 days during the period 21/1/1994 to 20/2/1994 respectively. There is no explanation from the side of the management as to why for the remaining period the nominal muster rolls were not produced. The labour Court has rightly held that there is nothing to disbelieve the certificate (Ex.W1). The High Court in its impugned judgment has not given reasons for discarding the said certificate. In the circumstance, we are of the view that the Division Bench of the High Court ought not to have interfered with the concurrent findings of fact recorded by the Labour Court and confirmed by the learned Single Judge vide order dated 7/6/2000 in writ petition No. 17636 of 2000. This is not, therefore, a case where the allegations of the workmen are founded merely on an affidavit. He has produced cogent evidence in support of his case. The workmen was working in SD 1, Athani and Ex. W1 was issued by the former Asstt. Executive Engineer, Hipparagi Dam Construction Division No. 1, Athani-591304. In the present case, the defence of the management was that although Ex. W1 refers to the period 22/11/1988 to 20/6/1994, the workmen had not worked as a daily wager on all days during that period. If so, the management was duty bound to produce before the Labour Court the nominal muster rolls for the relevant period, particularly when it was summoned to do so. We are not placing this

judgment on the shifting of the burden. We are not placing this case on drawing of adverse inference. In the present case, we are of the view that the workmen had stepped in the witness box and his case that he had worked for 240 days in a given year was supported by the certificate (Ex.W1). In the circumstances, the Division Bench of the High Court had erred in interfering with the concurrent findings of fact.

19. Before the concluding, we would like to make an observation with regard to cases concerning retrenchment/termination of services of daily waged earner, particularly those who are appointed to work in Government departments. Daily waged earners are not regular employees. They are not given letters of appointments. They are not given letters of terminations. They are not given any written document which they could produce as proof of receipt of wages. Their muster rolls are maintained in loose sheets. Even in cases, where registers are maintained by the Government departments, the officers/clerks making entries do not put their signatures. Even where signatures of clerks appear, the entries are not countersigned or certified by the appointing authorities. In such cases, we are of the view that the State Governments should take steps to maintain proper record of the services rendered by the daily wagers; that these records should be signed by the

> competent designated officers and that at the time of termination, the concerned designated officers should give certificates of the number of days which the labourer/daily wager has worked. This system will obviate litigations and procuniary liability for the Government."

Learned AGP Mr. Makwana submitted that contention of delay has been raised in written statement and contention that petitioner is not industry was also raised in the written statement but Labour Court has not considered it. From the entire award no where such contention was raised before the Labour Court by the petitioner. Merely, raising contention in written statement can not be considered as part of evidence it remain at the stage of pleadings only. The witness of petitioner Mr. Shah has been cross examined vide exh. 16 before the Labour Court. No evidence led in support of the contention which has been raised by the petitioner in written statement about the delay and industry. No submissions were made by the petitioner before the Labour Court about the delay and industry. Therefore, Labour Court has not examined these two contentions because same were not subsequently pressed by the petitioner before the Labour Court. Learned AGP Mr. Makwana has admitted that such contentions were not raised before the Labour Court by the petitioner about the delay and Industry except in written statement. No evidence was led in support of contention of industry and delay by the petitioner

before the Labour Court. In such circumstance for the first time this Court can not allow the petitioner to raise these two contentions before this Court which involved mixed questions of facts and law.

In view of the Apex Court decision reported in 2003 AIR SCW 2616 in case of Transmission Corporation of A.P. Ltd. And others v. P. Surya Bhagwan, and decision of Gujarat High Court reported in 2003 Labour and Industrial Cases 1793, Guj, in case of Executive Engineer, PWD, Rajkot v. Prakash Laxmidas Gajjar, the contention of the delay in raising of an industrial dispute and that the petitioner is not industry can not be accepted by this Court simply on the ground that same were not raised before the Labour Court. Apart from that, according to the workmen after termination they were approaching the petitioner on number of occasion and assurance were also given by the petitioner that they will be taken back in service, but ultimately respondents were not taken back in service. Therefore, dispute was raised and after a period of 15 years. The petitioner has not challenged the order of reference and no such contention was raised before the Conciliation officer, therefore, these contentions are rejected.

The Apex Court has observed in the case of Maharashtra State Mining Corp. Vs. SUNIL, son of Pundikarao Pathak, Appeal (civil) 2228 of 2006, reported in AIR 2006 SC 1923. Relevant para 4 is quoted as under:

> “4. In the writ petition the respondent had taken several grounds for challenging the dismissal order for example, that the relevant documents were not supplied, that he was not allowed to cross examine the witnesses, that he was not allowed to engage a lawyer, etc. However, a perusal of para 6 of the impugned judgment of the High Court shows that the writ petitioner did not press any of the grounds. The only ground which was pressed was that the order of dismissal was passed by the Managing Director of the Appellant, who had no authority or power to do so, as the same was vested in the Board of Directors of the appellent. In view of the fact that the respondent had not pressed these grounds before the High Court, we can not allow him to urge these points before us. The only issue which the High Court was called upon to decide was whether the removal of the respondent from service was by a competent authority.”

Similar aspect has also observed by the Apex Court in case of Orrissa Industrial Infrastructure Development Corp. Vs. Ashok Kumar Singh and Ors, reported in 2006 SCC (L&S) page 999, relevant Head note is quoted as under:

> “Regularisation- Of muster roll employees of appellant Corporation – High Court's

direction for regularization within specified time of the remaining workers who had not so far been regularized – Plea of backdoor entry, non existence of vacancy and ban on creation of posts issued by the State Government., raised on behalf of appellant before Supreme Court – No such pleas raised before High Court, not any counter affidavit filed before High Court by appellant who was respondent in the writ petition preferred by the employees – Held on facts, appellant can not be permitted to raise such pleas before Supreme Court – No interference of Supreme Court under Art. 136 with the directions issued by High Court called for – However, operation of those directions having been stayed by Supreme Court, appellant to be given a reasonable time to regularize the remaining employees – Constitution of India, Art. 136 – New plea – Not allowed."

And in case of Anwarul Haq Vs. State of Uttar Pradesh, reported in AIR 2005 SC 2382, relevant observations made by the Apex Court is quoted as under:

"12. We find that the trial Court has analysed in great detail the evidence of eye witnesses, including that of PW-1, the injured and, therefore, there is no scope for intereferance. The plea that the weapon used was not a dangerous weapon had never

been urged before the trial Court or the High Court. Whether weapon is a dangerous weapon or not has to be gauzed only on the factual basis. As there was no challenge on this aspect by the accused before the Courts below, that plea for the first time can not be permitted to be raised in this Court."

[See :
1.Engineering Kamdar Union Vs. Electro Steels Casting Ltd. And Anr. reported in 2004 SCC LIS, 782,
2. KR Anitha and Ors. Vs. Regional Director ESI Corporation and Anr. Reported in 2003 LLR 1075 SC.,
3. Haryana Turisum Corporation Ltd Vs. Fakirchand etc., reported in 2003 LLR 1121 SC."

Recently this Court has examined identical issue in SCA 9171/2007 decided on 5/4/2007 where similar contention was raised by the State Government. This Court has considered relevant observation in para 5 and 7 are quoted as under:

5. In Union of India and others versus Ramchander and another (2007) 1 Supreme Court Cases (L&S) 439, the apex court observed as under:

"2. The Union of India has challenged the impugned judgment of the Division Bench of the High Court of Rajasthan

passed on 12.1.2001. The respondents in these appeals were appointed as casual labourers (mazdoors) in the stores maintained by the Army having headquarters at Jodhpur. Initially, these respondents were appointed on daily wages for a period of 89 days and on completion of the period, they were terminated from service and again they were appointed as casual labourers immediately after their termination and thus they were terminated and reappointed in four spells. Originally their salary was fixed at Rs.750 per month plus allowances and thereafter it was raised to Rs.35 per day and later on to Rs.40 per day. When their services were first terminated on 11.1.1995, they challenged the same before the central Administrative Tribunal at Jodhpur. The respondents contended that they would have completed the requisite 240 days but for the intermittent termination of their services, and therefore, their termination was violative of sections 25F and 25G of the Industrial Disputes Act, 1947. Central Administrative Tribunal did not accept this plea and refused to grant any relief. Aggrieved by that order, the respondents preferred writ petitions before the High Court of Rajasthan, Bench at Jodhpur and by the impugned judgment, High Court directed that they shall be reinstated in service with effect from 31.3.2001 and further directed that the pay and allowances due to them shall be paid for the period they were out of service. That order is under challenge before this court.

3. We have heard the appellant's counsel and also the counsel for the respondents. The counsel for the appellants contended that the respondents were appointed as casual labourers for a period of 89 days and they had no right to be reinstated in service as they had completed 89 days, the period for which they were appointed. ON the other hand, counsel for the respondents contended that they were appointed as against the selection posts and they were also sponsored by the employment exchange and they had also undergone medical examination and that the termination orders served on the respondents were to see only that these respondents did not continue in service for a period of 240 days.

4. Respondents were appointed against casual labourers but nevertheless they continued in service for four spells and that too their reappointments were made immediately within a few days of termination on completion of 89 days. It shows that sufficient work was available with the employer and had there been no termination on completion of 89 days, they would have completed 240 days of continuous employment. In that view of the matter, the appellants had violated section 25G of the Industrial Disputes Act. We do not find any error or illegality in the decision rendered by the Division Bench. We direct the appellants to re-employ respondents as daily wagers. However, the direction of the High Court for payment of entire salaries and allowances for the period they were out of service was not justified

> under the circumstances. The termination of the respondents was from 11.1.95 and now a fairly long period has passed and in the mean time, the respondents must have been engaged in employment in any other work. Therefore, we direct the appellants to re-employ the respondents with 50 % per cent back wages from the date of their termination till their re-employment. The appellants shall re-employ the respondents within a period of one month. The appeals are disposed of accordingly. "

In view of the aforesaid decision of the apex court, I have perused award passed by the Labour Court, Rajkot. The dispute was referred to for adjudication on 10.5.1995. The period of service 21.9.84 to 30.5.85 rendered by Respondent. The statement of claim was filed by the respondent vide Exh. 3. The contentions raised are that section 25 F, G and H have been violated by the petitioner. The written statement was filed vide Exh. 17 which is annexed to the petitioner at Annexure C page 29. In the written statement, except denial, no positive details are given. No contention about delay in raising of an industrial dispute has been raised. No such contention was raised by the petitioner in oral evidence and also not raised during the course of submissions before the Labour

Court, Rajkot. The workman was examined at Exh. 14.The respondent employee has produced certificate given by the petitioner dated 4.12.84 vide Exh. 19. The order of appointment was also produced vide Exh. 20 to 24 dated 21.9.84, 18.10.84, 16.11.84, 18.12.84 and 16.1.85. The Salary Register produced by petitioner Patrak No. 1 to 10 10/84 to 6/85 vide Exh. 46 and Presence Certificate vide Exh. 50. The GR dated 17.10.88 has been produced vide Exh. 51. The respondent gave production application vide Exh. 37 to the labour court, Rajkot to direct the petitioner to produce muster rolls, pay register, vouchers and pay bills as well as seniority list, which was, subsequently, due to production of Presence details, not pressed by respondent. On behalf of petitioner, one witness Mr. Mansukhbhai Laxmanbhai was examined vide Exh. 45.

7.The labour court has considered section 25 (B) of the ID Act, 1947. On the basis of record produced by respective parties before it, labour court came to the conclusion that the respondent workman has remained continuous in service from 21.9.84 to

30.5.1985 and in between, service of respondent was not terminated and completed more than 240 days continuous service. The original muster roll was not produced by the petitioner on record. According to respondent, he has remained in service continuously in between period. That fact was admitted by the witness of the petitioner vide Exh. 45. The nature of work of respondent was a permanent and gap of 2 or 3 days in a month cannot be presumed. There was no defence of the petitioner that the respondent has not remained continue in service in between two appointment orders, means, there was no break in service between order of appointment, therefore, labour court came to the conclusion that the workman has remained continue in service from 21.9.1984 to 30.5.85. The labour court has rightly not believed the certificate where presence of respondent workman was worked out as 209 days but oral evidence made it clear to the effect

though periodical orders were issued in favour of the respondent with a 2 or 3 days break in each month but during break period, respondent was remained in service and subsequently with retrospective effect, next month, order was being issued by the petitioner. Therefore, this cannot be considered to be periodical appointments but as per evidence of both the parties, labour court has rightly appreciated that from date of joining till the date of termination, the respondent workman has remained continuous in service and has thus satisfied requirement of section 25(B) of the ID Act, 1947 and completed 252 days and section 25-F was not followed by petitioner as per the evidence of the petitioner at Exh. 45. No retrenchment compensation, notice or notice pay in lieu thereof was paid to respondent by the petitioner. Therefore, finding of fact that section 25 (F) has been violated is correct. Similarly, according to the evidence of the

respondent, after his termination, one Dilipkumar Ambalal Panchan was appointed on 22.10.1984. No positive reply is given by witness for petitioner and new employee was recruited as per the evidence of the respondent against which no positive reply was given by the witness of petitioner, therefore, finding of facts after appreciating the oral evidence come to conclusion that section 25 (F), (G) and (H) of the ID Act, 1947 have been violated by the petitioner. Labour court was right in recording such finding of fact on the basis of evidence before it. The seniority list was not produced which also violated Rule 81 of the Industrial Disputes (Gujarat) Rules, 1966 which is mandatory in nature but violated by the petitioner. Therefore, Labour Court has rightly set aside termination order which amounts to retrenchment under section 2(oo) of the ID Act, 1947 and granted reinstatement with continuity of service. The Labour Court

also rightly not granted back wages on the ground of delay in raising of an industrial dispute and evidence was given by the respondent after the period of six years from the date of reference and gainfully employed to some extent. The entire award is based on documents and oral evidence which was appreciated and decided by recording finding of facts by the labour court. The onus discharged by Respondent to prove 240 days continuous service. [See State of Gujarat v/s. Kasanbhai Jesang, 2006 II GHJ 175; Executive Engineer v/s. Shankarbhai Jivabhai Patel, 2006 12 GHJ 52; RM Yellati v/s. Asstt. Executive Engineer, 2006 (1) SCC 106; Surendranagar Panchayat v/s. Dayabhai Amarsinh, 2005-8-SCC 750 para 8; ONGC and another v/s. Shyamalchandra Bhowmik, 2006 SCC L&S 113; 2000 (2) GLR 1558, Moti Ceramics]

It has been pointed out by the learned AGP before this Court that the petitioners have raised contention

in written statement filed before the Labour Court that the petitioner is not an industry and the industrial dispute has been raised by the workmen concerned after the delay of about fifteen years but the same was not at all considered by the labour court while passing the award. From the perusal of the evidence led by the petitioner before the labour court, it appears that no evidence has been led by the petitioner before the labour court to prove the aforesaid contentions. Whether the petitioner is an industry or not and whether the dispute was existing or surviving in view of the delay on the part of the workmen concerned in raising of an industrial dispute? All these are mixed questions of law which are required to be pressed into service by the party raising such contentions after they are raised by it in its written statement before the labour court. Number of contentions can be raised by the party in its written statement or in the memo of petition and after such contentions are raised, same are required to be pressed into service and evidence in support of such contention is required to be produced before the labour Court to examine such contention. Here, in the cases before hand, after raising such contentions in the written statement, petitioner has not proved the same by producing evidence before the labour court and such contentions were not substantiated by the petitioner before the labour court. Therefore, merely, raising of contention in its written statement is not enough but the same should have to be substantiated and proved by cogent evidence before the labour court which has not been done by the petitioner

before the labour Court. Court should have to consider the observations made by the labour court and not to consider the submissions made by the learned AGP before this Court. No affidavit has been filed by the petitioner of an advocate who was appearing before the labour court to substantiate the contentions that these points were raised, pressed into service and necessary evidence were produced by petitioner before the labour court to substantiate these mixed question of law and fact. Whether the dispute was existing or not in view of such delay or not is a question which would require evidence. It is not the case of the petitioner before this court that such evidence produced by the petitioner was not considered by the labour court and that it was ignored by the labour court. Therefore, in such circumstances, this court should have to rely upon the observations made by the labour court and not to rely upon the submissions made by the learned AGP for the petitioner. In State of Maharashtra Versus Ramdas Shrinivas Nayak and another reported in AIR 1982 SC 1249, the Apex Court has taken view that the Judge's record is conclusive, neither lawyer nor litigant may claim to contradict it except before the Judge himself but nowhere else. Relevant observations made by the Apex Court in para 4,5,6 and 7 of the said judgment are reproduced as under:

> 4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri

Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we can not launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not upon to doubt. Judges can not be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkison in Somasundaran V. Subramanian, AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still, fresh

in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (per Lord Buckmaster in Madhusudan V. Chandrabati, AIR 1917 PC 30). That is the only way to have the record corrected. If no such steps is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

4-A. In R.V.Mellor (1858) 7 Cox CC 454 Martin B was reported to have said: “We must consider the statement of the learned judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.”

5. In King. Emperor V. Barendra Kumar Ghose, (1924) 28 Cal WN 170: (AIR 1924 Cal 257) (FB), page, J. said.

“..... these proceedings emphasis the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less

is it to be exposed to animad version.”

6. In Surat Chandra V. Bibhati Debi (1921) 34 Cal LJ 302 : (AIR 1921 Cal 584), Sir Asutosh Mookherjee explained what had to be done:

“It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge, without delay and ask for rectification or review of the judgment”.

7. So the Judges' record is conclusive. Neither Lawyer not litigant may claim to contradict it, except before the Judge, himself, but nowhere else.”

Similarly, in the matter of Daman Singh and others V. State of Punjab and others, etc reported in AIR 1985 SC 973, Five Judges' Bench of the Hon'ble apex Court observed as under in para 13 of the said judgment:

“13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable grounds in the petitions and memoranda of appeal etc., but later, confine themselves in the course of arguments to a few only of those grounds, obviously because the rest of the grounds are considered even

> by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw attention of the court making the order to it by filling a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment o the subordinate court was argued before that court or not.?”

In view of the observations made by the Apex Court in aforesaid two decisions, applying the same to the facts of the present case, it becomes clear that except raising contention in its written statement by the petitioner before the labour court, no further process was carried out by the petitioner before the labour Court. No evidence worth the name was produced by the petitioner to prove said two mixed questions of law and facts and in view of that, now petitioner cannot be permitted to press into service such contentions and now petitioner therefore can not raise any grievance against the labour court that the labour court has not considered said contentions and award in question cannot be held

to be bad in law on that ground. Therefore, those contentions raised by the learned AGP before this court are rejected.

Recently the Apex Court in case of M/s. Sriram Industrial Enterprises Lt. Vs. Mahek Singh. and others reported in 2007 AIR SCW page 1712 decision dated 8/3/2007, this question has been in detailed examined by the Apex Court. In recent decision of Apex Court in case of R.M. Yellati has been approved and case of Hadimani has been considered to be watered down by R.M.Yellati. The Apex Court has also examined that upon whom the initially onus would be naturally, how the burden would be sifted while considering Sec. 114 of the Evidence Act Illustration(g). The Apex Court held that continue service and evidence and proof, workmen had discharged their initial onus by producing the whatever documents were in their custody to show that they continuously worked for 240 days. Non production of attendance registers and muster roll by employer which is considered to be a best evidence has been withheld then Court is entitled to draw the adverse presumption against the employer in terms of Sec. 114 Illustration(g)of Evidence Act and reinstatement of the workmen has been held to be proper.

The Apex Court has relied upon the decision reported in UP Drugs and Pharmaceuticals Company Ltd., 2003 AIR SCW page 4739 and RM Yellatty's case 2005 AIR SCW page 603, the relevant discussion in para 32, 33, and 34 are quoted as under.

“32. The said approach, in our view, was erroneous in view of the decision of this Court in the case of U.P.Drugs and Pharmaceuticals Company Ltd. (Supra) The petitioner had wrongly described the documents relating to attendance for the years 1991 onwards as far as the respondents are concerned, as being irrelevant and the Tribunal has also accepted the said reasoning. Consequently, instead of drawing an adverse presumption for non production of the said records, the Tribunal accepted the contention of the petitioner that the workmen had not worked for more than 240 days in the year preceding the date of their termination nor had the workmen filed any proof to show otherwise.

33.In our view, the High Court adopted the correct approach while deciding the controversy between the parties upon a correct understanding of the law as contained in Section 6 N read with Section 2 (g) of the U.P. Act which is applicable to these petitions.

34. Having correctly interpreated the provisions of Section 6 N of the U.P. Act, the High Court rightly drew an adverse presumption for non production of the Attendance Registers and the Muster Rolls for the year 1991 onwards. The best evidence having been withheld, the High Court was entitled to draw such adverse inference. The views expressed by this Court on the question of burden of proof in Range Forest Officer's case (supra) were watered down by the

subsequent decision in R.M. Yellaty's case (supra) and in our view the workmen had discharged their initial onus by production of the documents in their possession."

In para 34, the Apex Court has considered that High Court rightly drawn an adverse presumption for the non production of the presence register and muster roll for the years 1991 onward. The best evidence having been withheld the High Court therefore, entitled to draw such adverse inference. The views expressed by the apex Court on the question of burden of prove in Range Forest Officer case (Supra) were watered down by the subsequent decision in R.M. Yellaty (supra) and as per the view of the apex court, the workmen therein had discharged their initial onus by production of the documents in their possession. Therefore, considering the recent decision of Apex Court as referred above, the case of Range Forest Officer (supra) which has been subsequently watered down by decision in R.M.Yallati case and Labour Court Surendranagar has considered while passing award the decision in case of R.M. Yallati and come to the conclusion that when the workmen is not having any documentary evidence because same were not supplied by the petitioner then in such circumstance evidence of the workmen when examined is to be considered to be evidence which would enable the workman to discharge the onus to prove factum of completion of 240 days continuous service and then such burden would stand shifted on the petitioner to disprove by production of necessary documents which were in their custody.

It was not the case of the petitioner that respondents workmen were not at all appointed by the petitioner because there is no necessary detail given in written statement by the petitioner. It is also not the case of the petitioner that such documents are not in possession of the petitioner. Therefore, ultimately labour Court has come to the conclusion that in absence of evidence which has been withheld by the petitioner, the evidence of workmen has to be accepted because no documentary evidence contrary to the oral evidence of the workmen has been produced by the petitioner.

I have perused the award passed by Labour Court Surendranagar and I have considered the submissions made by learned AGP Mr. Hemant Makwana and also considered the recent decision while allowing the reference granting the reinstatement without backwages. The Labour Court has rightly relied upon the case of R.M.Yellati and recent decision of Apex Court in case of M/s. Sriram Industries where earlier view in case of S.T. Hadimani has been watered down. In view of the decision of R.M.Yallati case, therefore, when workmen is not having any documentary evidence about the service rendered by the respondents then in such circumstance the observation is made by the Apex Court that the case of R.M.Yallati should have to be relied upon and hold field. Therefore, Labour Court has not committed any error while passing such award. The finding given by the Labour Court is based on evidence. The conclusion of the Labour is reasonable looking to the evidence on record because

it has not grated any amount of back wages and reinstatement has been granted because of mandatory provision of Sec. 25 (F)(G)(H) of I. D. Act has been violated by the petitioner. The petitioner has not disclosed the merits in written statement except raising the legal contention and witness Mr. Shah vide exh. 16 examined before the Labour Court having no information about the nature of work of the respondents workmen because he was appointed in the year 2004 and for the period prior to that, petitioner's witness Mr. Shah have no personal information in respect to the merits of matter so the evidence of their witness also not helpful to the petitioner and therefore, evidence of the workmen remain unchallenged on merits which has been rightly believed by the Labour Court and accordingly relief has been rightly granted. Therefore, the Labour Court has rightly adjudicated references and for that no error has been committed by the Labour Court which require interference by this Court while exercising the power under Art. 227 of the Constitution of India.

This Court can not act as Appellate authority and these fact findings can not be reappriciated having been it was appreciated by the Labour Court and this Court can not interfere with the award passed by the Labour Court while exercising the power under Art. 227 of the Constitution of India since findings given by the labour court are not perverse or contrary to the evidence on record.

Therefore, there is no substance in the present

petitions. Accordingly, present petitions are dismissed.

(H.K.RATHOD, J)

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